85-2098

Supreme Court, U.S.
FILED
MAR 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

NO.

RICHARD RUSSELL PETITIONER - APPELLANT

vs.

SAM MILLSAP, JR. ET AL, RESPONDENT - APPELLEE

NO. 85-2214 and NO. 85-2384

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

RICHARD RUSSELL
PRO-SE
16106 N.W. MILITARY HWY.
SAN ANTONIO, TEXAS 78231

A.

QUESTIONS PRESENTED FOR REVIEW

1.

Whether the Lower Federal Courts and State of Texas Court of Criminal Appeals rendered a decision in conflict with, Texas State Law and Federal Law, when they refused to rule if the State District Judge ordered this injunction dismissed?

2.

Whether the Lower Federal Courts ruled correctly that the defendants have the right to **MAKE** and **INFLICT** a VOID, DISMISSED, and **UNCONSTITUTIONAL** injunction? (Judicial immunity).

3.

Whether the Lower Federal Courts rendered a decision in conflict with this Court, when it ruled, State has the right, to take away the rights afforded a United States Citizen, to **USE** and **OWN** a legal business, First and Fourteenth U.S. Amendments to the Constitution?

4.

Whether Fifth Circuit Court overturned a well settled Supreme Court case that prohibits punishing unrepresented litigants for not recognizing subtle factual or legal deficiencies in his claims?

B.

PARTIES

Sam Millsap, Jr.
E. Dickinson Ryman
Michael Black
John Pickney, III
Odis Doyle
J. Harrison
Jim Mattox

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IN THE

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NO.

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16106 N.W. MILITARY HWY.
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E.

DECISIONS BELOW

The decisions of the U.S. Court of Appeals for The Fifth Circuit is reported as Appendix A.

F.

JURISDICTION

The judgment of the U.S. Court of Appeals for The Fifth Circuit was entered on December 27, 1985.

An order denying a petition for rehearing was entered on January 29, 1986.

A copy of the orders are attached as Appendix A.

Jurisdiction is conferred by 28 U.S.C. 1254 (1)

G.

CONSTITUTIONAL PROVISIONS

United States Constitution

First Amendment .....

Fourteenth Amendment .....

Eighth Amendment .....

Statues and Rules

28 U.S.C. 1254 (1)

H.

STATEMENT OF THE CASE

On October 11, 1984, Petitioner filed a Civil Rights Lawsuit in the Western District of Texas, to contest this **VOID, ORDERED, DISMISSED, UNCONSTITUTIONAL INJUNCTION.** On February 25, 1985, The Federal District Court dismissed, this lawsuit, on

January 29, 1986. The Fifth Circuit Court of Appeals on motion for rehearing, dismissed without comment this civil rights lawsuit.

All this abuse has been accomplished by The Fruits of a Poisonous Tree (A ordered, dismissed, injunction).

I.

ARGUMENTS IN SUPPORT OF GRANTING CERTIORARI

1.

THE LOWER FEDERAL COURTS AND STATE OF TEXAS COURT OF CRIMINAL APPEALS RENDERED A DECISION IN CONFLICT WITH, TEXAS STATE LAW AND FEDERAL LAW, WHEN THEY REFUSED TO RULE IF THE STATE DISTRICT JUDGE ORDERED THIS INJUNCTION DISMISSED?

The Judge in this case ordered "That pursuant to Tex. R. CIV. P. 164, the Plaintiff (State of Texas) shall take a non-suit in this cause as against all other defendants, and those defendants shall be, and are hereby dismissed." Non suit means, name of a judgment given against The Plaintiff when he is unable to prove a case, refer to; *Jaquith vs. Revson,* 159 Conn. 427, 270 A. 2D 559, 561. The order in the case at bar is for failure of the plaintiff to be more specific, which an appeal lay. Again in, *Tromanhauser vs. Grisemer,* 123 CAL. APP. 153, 11 P. 2D, 32, 33,

2 CAL. JUR. 402; 9 CAL. APP. JUR. 565. The entry of the order (Granting motion for non-suit). Therefore is equivalent to a final judgment and it finally disposes of the matter to which it relates.

Plaintiff did not appeal the judges order, in support of specificty; Russell will show:

Judge ordered injunction, through the desire of the State of Texas, that it's REPRESENTATIONS and Defendant's be, dismissed.

Page 2 refer to orders; order and judgment of permanent injunction, fails to meet the test established by the Supreme Court of Texas in Ex Parte: Slavin S.W. 2D 43, Tex. 1967 and Ex Parte: Pardon 565 S.W. 2D 921, Tex. 1978. The Court has held that the order, must clearly state the details in clear, specific and unambigious terms.

1st order states that this order shall not be rescinded, revoked, rejected, abandoned, breached or otherwise disavowed by any of the parties at any time or for any reason. 2nd order: plaintiff takes a non suit in this **CAUSE** as against all other defendants, hereby dismissed.

2nd order: clearly dissolves the first order and removes the **CAUSE** of the permanent injunction dismisses the cause and defendants.

3rd order, it is.....own costs. The 2nd order removes the **CAUSE** and the defendants from this action. Thereby rendering it worthless, the only parties left in the suit are the plaintiffs. A violation of the XIV Amendment rights of the Constitution of the United States.

In short Plaintiff can not ask to have ordered, out of this injunction, the cause, being crime, and representations, being everything written, irregardless of who they wish to target as defendants. The State simply dismissed the crime (crime being the first defendant "Public Nuisance"). This alone defies the rule that an injunction must be specific, who are all other defendants, why are the words "ET AL" in this injunction, ET AL can never be a specific term. The Court can not allow evidence to be introduced to clarify an order that is not on its face clear and unambiguous, as to when and why Plaintiff, may have disobeyed this injunction. There can be no mistake that the State District Judge did order injunction dismissed. Certiorari should be granted in this case, because State and Federal Appeals Courts will not rule against these select defendants.

2.

THE LOWER FEDERAL COURTS RULED INCORRECTLY THAT THE DEFENDANTS HAVE THE RIGHT TO MAKE AND INFLICT A VOID, DISMISSED, AND UNCONSTITUTIONAL INJUNCTION? (JUDICIAL IMMUNITY).

There is no question that the defendants made injunction, they do not deny it, Judicial Immunity can not be a defense, defendants would have had to be aware some harm would be fall Plaintiff, as they inflicted this injunction, three times after dismissing it, for examples of the

extreme behavior required to permit a damage award against a Judge, see: *Harper vs. Merckle,* 638 F. 2D 848 (5th Cir. 1981); *Zarcone vs. Perry* 572 F.2D 52 (2nd Cir. 1978); Prosecutors acts not cloaked in absolute immunity, see: *Price vs. Moody,* 677 F.2D 676 (8th Cir. 1982); *Henderson vs. Fisher,* 631 F 2D 1115, 1120 (3rd Cir. 1980); *Red Cross vs. County of Rensselaer,* 511 F. SUPP. 364 (N.D.N.Y 1981).

There is also a challenge to that Appellant, fails to state a Civil Rights Claim, this should dispel that argument. A direct violation of the VIII Amendment of the Constitution of the United States.

3.

THE LOWER FEDERAL COURTS RENDERED A DECISION IN CONFLICT WITH THIS COURT, WHEN IT RULED, STATE HAS THE RIGHT, TO TAKE AWAY THE RIGHTS AFFORDED A UNITED STATES CITIZEN, TO **USE** and **OWN** A LEGAL BUSINESS, UNDER FIRST AND FOURTEENTH U.S. AMENDMENTS TO THE CONSTITUTION?

Appellant argues that Appellee's injunction Restraint No. 4 "using, involving massage," is unconstitutional because it violates Petitioners Association Rights.

In *Angola vs. Civiletti,* 666F, 2D 1 (1981); *Bates vs. Little Rock,* 361 U.S. 516, 523 (1960); *National Association for the Advancement of Colored People vs. Alabama,* 357 U.S. 449, 460 (1967); *DeJonge vs.*

Oregon, 299 U.S. 353, 364 (1937); *Gilmore vs. City of Montgomery, Alabama,* 94 S. CT. 2416 (1974); *Healy vs. James,* 408 U.S. 169, 181-183, 92 S. CT. 2338, 2346-2347, 33 L ED. 2D, 266 (1972) because its exercise is largely dependent on the right to own or USE property. *Kusper vs. Pontikes,* 94 S. CT. 303 (1973).

If there is a challenge to the word **MERE** in Kusper mere is appropriate in this case as State does not allege a National, or State disaster, a health threat of any kind. This injunction language would prohibit Appellant from **USING** a hospital massage room.

The very issue of the Petitioners' Association Right was recognized by the Federal District Court for the Western District of Texas in SA-84-CA-2060. This 1983 action wherein, Judge H.F. Garcia stated, in his "memorandum opinion and order of dismissal" dated February 25, 1985, on Page 6, **WHILE PLAINTIFF HAS BEEN DENIED LIBERTY AND, PERHAPS, PROPERTY BY THE INJUNCTION, HE WAS AFFORDED DUE PROCESS PRIOR TO THE DEPRIVATION."**

4.

WHETHER FIFTH CIRCUIT COURT OVERTURNED A WELL-SETTLED SUPREME COURT CASE THAT PROHIBITS PUNISHING UNREPRESENTED LITIGANTS FOR NOT RECOGNIZING SUBTLE FACTUAL OR LEGAL DEFICIENCIES

IN HIS CLAIMS.

Federal Lower Courts has clearly erred in the awardment of attorney fees against the Appellant because he was unrepresented in his action. See *Hughes vs. Rowe,* 101 S. CT. 173 (1980).

J.

CONCLUSION

Certiorari should be granted because the Fifth Circuit Court of Appeals is attempting to justify the representations of this **ORDERED, DISMISSED INJUNCTION,** which is not possible. Injunction being unconstitutional, has clearly been presented to the Fifth Circuit Court, and this Court.

Respectfully Submitted

Richard Russell

Richard Russell
16106 N.W. Military Hwy.
San Antonio, Texas 78231

K.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing petition has been forwarded to the Attorney General Jim Mattox, and all defendants attorneys.

Done this the 13th day of June, 1986.

Richard Russell

Richard Russell

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-2214

RICHARD RUSSELL, Plaintiff-Appellant,

versus

SAM MILLSAP, JR., ET AL.,
Defendants-Appellees.

U.S. COURT OF APPEALS
FILED
FEB 13, 1986
GILBERT F. GANUCHEAU
Clerk

No. 85-2384

RICHARD RUSSELL, Plaintiff-Appellee,

Versus

SAM MILLSAP, JR., ET AL., Defendants,

ODIS DOYLE and JAMES HARRISON, Defendants-Appellants.

Appeals from the United States District Court for the
Western District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 12/27/85, 5 Cir., 198 ___, _____ F.2d _____)

(FEBRUARY 13, 1986)

Before POLITZ, GARWOOD and JOLLY, Circuit Judges.

PER CURIAM:

(✔) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal

Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in Active Service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

REHG-6

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RICHARD RUSSELL,
Plaintiff-Appellant,

v.

SAM MILLSAP, JR., ET AL.,
Defendants-Appellees.

No. 85-2214
Summary Calendar

CONSOLIDATED
WITH

RICHARD RUSSELL,
Plaintiff-Appellee,

v.

SAM MILLSAP, JR., ET AL.,
Defendants,

ODIS DOYLE and JAMES HARRISON,
Defendants-Appellants.

No. 85-2384
Summary Calendar

OPINION

Filed December 27, 1985

Before: Henry A. Politz, Will Garwood, and
E. Grady Jolly, Circuit Judges.

Opinion by Judge Henry A. Politz

Appeals from the United States District Court
for the Western District of Texas
H.F. Garcia, District Judge, Presiding

SUMMARY

Civil Rights/Injunctions/Constitutional Law

Appeal from dismissal of a *pro se* U.S.C. § 1983 suit contesting the validity of a state court injunction which enjoined the use of premises

in a Texas county for purposes of promoting prostitution. Affirmed.

Plaintiff entered into a plea bargain with the state and agreed to enter a plea of *nolo contendere* to charges of aggravated promotion of prostitution, agreed to a permanent injunction and received a sentence of probation with adjudication deferred. The consent injunction ordered plaintiff to restrain from using premises for the promotion of prostitution. Plaintiff violated the injunction the next day and continued the violations. He was found in contempt, his probation was revoked, and he was fined and sentenced to prison. He then brought this action for violation of his constitutional rights.

[1] Plaintiff's complaint is devoid of merit and does not state a claim upon which relief can be granted. **[2]** The three prosecutors enjoy absolute immunity from any civil liability arising out of the performance of their prosecutorial duties. **[3]** Nor are there any factual allegations of any conspiratorial conduct involving the prosecutors and any other defendant. **[4]** Plaintiff's retained counsel was not acting under color of state law. **[5]** The injunction is not unconstitutional and **[6]** plaintiff was not denied due process. **[7]** Costs and attorneys' fees were appropriately awarded.

OPINION

HENRY A. POLITZ, Circuit Judge:

Richard Russell appeals the dismissal of his *pro se* 42 U.S.C. § 1983 suit contesting the validity of a state court order which enjoined, *inter alia,* his use of premises in Bexar County, Texas for purposes of promoting prostitution. Russell named as defendants Sam Millsap, Jr., District Attorney of Bexar County, Michael Black and E. Dickinson Ryman, assistant district attorneys, John Pickney III, retained defense counsel in the state court proceedings, and Lt. Odis Doyle and Officer James Harrison of the San Antonio Police Department. Russell's appeal bears our docket number 85-2214. In dismissing Russell's complaint as frivolous and totally without merit, the district court awarded costs and attorney's fees to the defendants. In our docket number 85-2384, claiming insufficiency Doyle and Harrison appeal the attorneys' fees awarded to them. Finding neither error of fact nor law, we affirm the district court in both appeals.

FACTS

Russell's operations in San Antonio became the focus of both civil and criminal authorities in 1983. He was charged with Aggravated Promotion of Prostitution, a third degree felony under Tex. Penal Code Ann. art. 43.04. At the same time, the State of Texas sought a permanent injunction, restraining massage parlor and prostitution activities which violated Texas law.

A plea bargain was struck by the state and Russell under which Russell entered a plea of *nolo contendere* to the criminal charge, agreed to a permanent injunction and received a sentence of probation with adjudication deferred. In the consent injunction Russell was ordered to refrain from using, operating, or allowing the operation of the premises at 451 McCarty Road, San Antonio, known as the Paris Modeling Studio, or any other location in Bexar County, for the promotion of prostitution. The permanent injunction was signed by attorneys for the State of Texas, Russell, and the state court on May 18, 1983.

Russell violated the injunction the very next day and he was cited for contempt on May 20, 1983. Continued violations triggered a supplemental motion for contempt on June 10, 1983. On June 24, 1983, Russell was found in contempt. No appeal was taken from that order but continued violations occurred and on August 26, 1983 the state moved for revocation of probation. After an evidentiary hearing, Russell's probation was revoked and he was sentenced to imprisonment for six years and fined $5,000. The revocation was affirmed on appeal by the Texas Court of Criminal Appeals for the Fourth Supreme Judicial District.

Russell filed the instant complaint contending that the injunction invaded his constitutional rights and that the defendants all had a culpable part in its issuance and enforcement. The case was routinely referred to a magistrate, 28 U.S.C. § 636(b)(1)(B), who concluded that the complaint was frivolous. Russell objected to the magistrate's report and sought *de novo* review. The district court conducted this review and dismissed Russell's complaint, finding neither equal protection nor due process violations and further finding that by agreeing to the injunction Russell had waived the opportunity to be heard thereon.

Based on findings that Russell's suit was frivolous, unreasonable, wholly without foundation, and in bad faith, the district court awarded attorneys' fees to counsel for Millsap, Ryman, and Black in the amount of $4,730; to counsel for Doyle and Harrison a like sum; and to

counsel for Pickney, the sum of $4,147.50.

ANALYSIS

[1] Russell attacks the permanent injunction which he consented to as part of the plea bargain to avoid imprisonment on the criminal charge. The certain and unequivocal condition, spelled out in the injunction in unmistakeable terms, was that he desist from operating illicit massage parlors and terminate all activities promoting prostitution in Bexar County, Texas. We agree with the district court that Russell's complaint is devoid of merit and does not state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In doing so, we note the obvious.

[2] The three prosecutors were performing typical prosecutorial functions. There is no allegation to the contrary. They enjoy absolute immunity from any claim for civil liability arising out of the performance of these duties. *Imbler v. Pachtman,* 424 U.S. 409 (1976); *Sparks v. Duval County Ranch Co.,* 604 F.2d 976 (5th Cir. 1979) (en banc), *aff'd sub nom. Dennis v. Sparks,* 449 U.S. 24 (1980).

[3] There are no factual allegations of any conspiratorial conduct involving the prosecutors and any other defendant. Russell's mere characterization of defendants' conduct "as conspiratorial or unlawful [does] not set out allegations upon which relief can be granted." *Dinwiddie v. Brown,* 230 F.2d 465, 469 (5th Cir.), *cert. denied,* 351 U.S. 971 (1956)

[4] As Russell's retained counsel, Pickney was not acting under color of state law, an essential for a § 1983 suit. *Polk County v. Dodson,* 454 U.S. 312 (1981); *O'Brien v. Colbath,* 465 F.2d 358 (1972). The allegations of conspiracy by Pinckney are, at best, conclusionary and do not state a § 1983 cause of action. *Tower v. Glover,* ____ U.S. ____, 81 L.Ed.2d 758 (1984); *Arsenaux v. Roberts,* 726 F.2d 1022 (5th Cir. 1982).

[5] Russell contends that the injunction is unconstitutional. The claim is without merit; a state has authority to regulate professions and businesses which affect the public interest. Such regulations must be rationally related to a legitimate state interest. We have upheld the regulation of massage parlors by Harris County and the City of San Antonio. *Harper v. Lindsay,* 616 F.2d 849 (5th Cir. 1980); *Pollard v. Cockrell,* 578 F.2d 1002 (5th Cir. 1978).

[6] Russell's complaint that he was denied due process is belied by the record. He received notice of the charges, both criminal and civil, he was represented by counsel, and was given an opportunity to be heard before an impartial tribunal. His suggestion that the nolo plea and signature on the injunction was "coerced and conspired" is without factual support. Russell's complaint to this court that he did not receive due process in the proceedings conducted by the magistrate and district judge approach the ludicrous.

ATTORNEY'S FEES

[7] The district court appropriately awarded defendants costs and attorneys' fees. *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412 (1978); *Hughes v. Rowe,* 449 U.S. 5 (1980); *Schwartz v. Folloder,* 767 F.2d 125 (5th Cir. 1985). The court reviewed the claims for attorneys' fees under the *Johnson v. Georgia Highway Express* factors, as underscored in *Copper Liquor, Inc. v. Adolph Coors Co.,* 624 F.2d 575 (5th Cir. 1980). The rates set by the court and the hours accepted as being necessary for the services required in these proceedings appear fair, just, and reasonable. The court granted the rates requested by all counsel except counsel for Doyle and Harrison, allowing them the highest rate awarded other defense counsel. We perceive no abuse of discretion justifying our intervention. *Davis v. West Community Hosp.,* 755 F.2d 455 (5th Cir. 1985); *Lee v. Southern Home Sites,* 429 F.2d 290 (5th Cir. 1970).

The judgment of the district court is, in all respects, AFFIRMED.

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Supreme Court, U.S.
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NO. 85-2098

In The

UNITED STATES SUPREME COURT

October Term 1986

RICHARD RUSSELL,)
)
Petitioner)
)
v.)
)
SAM MILLSAP, JR.,)
et al.,)
)
Respondents.)

BRIEF OF RESPONDENT, JOHN M. PINCKNEY, III, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

John J. Franco, Jr.
Groce, Locke & Hebdon
2000 Frost Bank Tower
San Antonio, Texas
78205
(512) 225-3031

COUNSEL OF RECORD FOR RESPONDENT, JOHN M. PINCKNEY, III

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NO. 85-2098

In The

UNITED STATES SUPREME COURT

October Term 1986

RICHARD RUSSELL,	)
	)
Petitioner	)
	)
v.	)
	)
SAM MILLSAP, JR., et al.,	)
	)
Respondents.	)

BRIEF OF RESPONDENT,
JOHN M. PINCKNEY, III,
IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI

The Respondent, John M. Pinckney III, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the United States Court of Appeals for the Fifth Circuit in this case. That opinion is reported at 781 F.2d 381 and appears in the Appendix to the

Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Petitioner initiated the present action on or about October 11, 1984. Petitioner generally alleged that his civil rights had been violated through the entry of a permanent injunction which enjoined him from engaging in the business of massage in San Antonio, Bexar County, Texas. Respondent Pinckney was the retained counsel for Petitioner in that proceeding. Petitioner brought suit against Respondent Pinckney for Respondent Pinckney's alleged participation in the issuance of this injunction. In response to Petitioner's suit, Respondent filed a motion to dismiss for failure to state a claim under 42 U.S.C. § 1983 pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

On or about January 17, 1985, the United States District Court for the Western

District of Texas, the Honorable Hippolito Garcia presiding, referred Petitioner's suit to the United States Magistrate for findings of fact and recommendations. On January 23, 1985, the Magistrate recommended that the suit be dismissed with prejudice for failure to state a claim under 42 U.S.C. § 1983. The Magistrate also found that the complaint was "utterly frivolous."

On or about February 25, 1985, the United States District Court for the Western District of Texas, the Honorable Hippolito Garcia presiding, dismissed Petitioner's lawsuit. The District Court found Petitioner's lawsuit was "frivolous, unreasonable and wholly without foundation" and awarded attorneys' fees to the Defendants, including the Respondent herein.

The Petitioner appealed the dismissal of his suit to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit upheld the dismissal of the suit

against Respondent Pinckney on the grounds that Respondent was not acting under color of state law as Petitioner's retained attorney. The Fifth Circuit further found that Petitioner's allegations of a conspiracy to deprive him of his civil rights were insufficient to state a cause of action under 42 U.S.C. § 1983 against Respondent Pinckney. The Fifth Circuit also upheld the award of attorneys' fees against Petitioner observing that the District Court had found Petitioner's suit frivolous and totally without merit.

REASONS FOR DENYING THE WRIT

As hereinafter indicated, this case does not satisfy this Court's criteria for granting review by Writ of Certiorari as set forth in Rule 17 of the Rules of this Court.

1. The Decision of the Court Below Affirming the Dismissal of Petitioner's 42 U.S.C. § 1983 Action Against Respondent Pinckney Does Not Conflict with

Decisions of this Court or with Decisions of Other Courts of Appeals.

Petitioner challenges the dismissal of his suit for failing to state a "Civil Rights Claim." See Petition for Writ of Certiorari at 10. Petitioner bases his challenge upon an alleged direct violation of the Eighth Amendment to the United States Constitution. Id.

The Fifth Circuit held that Respondent Pinckney, who was Petitioner's retained counsel in the proceedings out of which the complained of injunction was issued, did not act under color of state law. As a result, a 42 U.S.C. § 1983 action was not established. The Fifth Circuit's holding that a retained counsel does not act under color of state law does not conflict with decisions of this Court. See Polk County v. Dodson, 454 U.S. 312, 102 S. Ct. 445, 70 L.Ed.2d 509 (1981). The Fifth Circuit's decision also does not conflict with decisions of other Courts of

Appeals. See Rivera v. Green, 775 F. 2d 1384 (9th Cir. 1985); Cornes v. Munoz, 724 F. 2d 61 (7th Cir. 1983); Black v. Bayer, 672 F. 2d 309 (3rd Cir.), cert. denied, 459 U.S. 916 (1982); Ellison v. De La Rosa, 685 F. 2d 959 (5th Cir. 1982); Hall v. Quillen, 631 F. 2d 1154 (4th Cir. 1980), cert. denied, 454 U.S. 1141 (1982); Barnes v. Dorsey, 480 F. 2d 1057 (8th Cir. 1973); Page v. Sharpe, 487 F.2d 567 (1st Cir. 1973); Szijarto v. Legeman, 466 F. 2d 864 (9th Cir. 1972); Mulligan v. Schlachter, 389 F. 2d 231 (6th Cir. 1968).

The Fifth Circuit also ruled that Petitioner's allegations of conspiracy to violate Petitioner's civil rights against Respondent Pinckney were at best conclusionary and were insufficient to state a claim under 42 U.S.C. § 1983. In reaching this conclusion, the Fifth Circuit did not render a decision which conflicts with the decisions of other Courts of Appeals. See Sooner Products v. McBride, 708 F. 2d 510 (10th Cir.

1983); Arsenaux v. Roberts, 726 F. 2d 1022 (5th Cir. 1982); Aldabe v. Aldabe, 616 F. 2d 1089 (9th Cir. 1980); Slotnick v. Staviskey, 560 F. 2d 31 (1st Cir. 1977), cert. denied, 434 U.S. 1077 (1978); Cerbone v. County of Westchester, 508 F. Supp. 780 (S. D. N. Y. 1981).

Petitioner makes a cryptic reference to the Eighth Amendment to the United States Constitution as providing a basis for his cause of action against Respondent Pinckney. See Petition for Writ for Certiorari at 10. Petitioner apparently asserts that, since there is allegedly a direct violation of the Eighth Amendment, he has stated a cause of action under 42 U.S.C. § 1983. Petitioner does not specify the portion of the Eighth Amendment which he feels provides the basis for his suit. Irrespective of Petitioner's argument, the Petition for Writ of Certiorari is the first occasion in which Petitioner has raised any argument concerning the Eighth

Amendment.

It is axiomatic that "(a) party cannot raise a new theory on appeal that was not presented to the court below." Capps v. Humble Oil & Refining Co., 536 F. 2d 80, 82 (5th Cir.), citing Wolfe v. Frank, 477 F. 2d 467 (5th Cir. 1976), cert. denied, 414 U.S. 975, 38 L.Ed.2d 218, 94 S. Ct. 287 (1973) and Autrey v. Williams And Dunlap, 343 F. 2d 730 (5th Cir. 1965). This Court has steadfastly held to a similar rule. Brown v. Socialist Workers '74 Campaign Committee (Ohio), 459 U.S. 87, 74 L.Ed.2d 250, 264, 103 S. Ct. 416 (1982); United States v. Mitchell, 445 U.S. 535, 546, n. 7, 63 L.Ed.2d 607, 618, n. 7, 100 S. Ct. 1349 (1980); Adickes v. Kress & Co., 398 U.S. 144, 147, n. 2, 26 L.Ed.2d 142, 148, n. 2, 90 S. Ct. 1598 (1970). Thus, Respondent Pinckney urges this Honorable Court to decline to consider Petitioner's allegation that the Eighth Amendment to the United States Constitution would support a 42

U.S.C. § 1983 cause of action in the present case.

2. The Decision of the Court Below Affirming the Award of Attorneys' Fees to Respondent Pinckney Does Not Conflict with the Decisions of This Court or with the Decisions of Other Courts of Appeals.

Petitioner asserts that the Fifth Circuit's affirmance of the District Court's award of attorneys' fees against Petitioner conflicts with previous decisions of this Court. Specifically, Petitioner claims that the award of attorneys' fees against him, a pro se litigant, conflicts with this Court's decision in Hughes v. Rowe, 449 U.S. 5, 101 S. Ct. 173, 66 L.Ed.2d 163 (1981).

In the present case, the Fifth Circuit did not intervene in the District Court's award of attorneys' fees because the Fifth Circuit found no abuse of discretion in the District Court's action. The Fifth Circuit

observed that the District Court had found Petitioner's complaint to be frivolous, unreasonable, wholly without foundation and in bad faith.

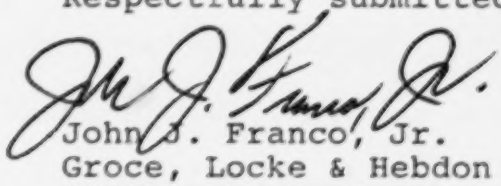
This Court's decision in Hughes v. Rowe, supra, does not hold that attorneys' fees can never be awarded against pro se litigants. The Hughes decision warns against the ready award of attorneys' fees against pro se litigants and cautions that such awards should not be made routinely. This Honorable Court did not bar the award of attorneys' fees against a pro se litigant where the suit was found to be frivolous, without merit or brought in bad faith. The Court's opinion does indicate that an award can be made against an unrepresented litigant where the suit is found to be frivolous, unreasonable or without foundation. Since there is no absolute bar to such an award, the Fifth Circuit's affirmance of the District Court's award does not conflict with any decision of

this Court. See also Partee v. Lane, 528 F. Supp. 1254 (M.D.Ill. 1981).

CONCLUSION

For the reasons stated above, Respondent John M. Pinckney, III believes that the Court should deny the Petition for Writ of Certiorari and respectfully requests this Court to so rule.

Respectfully submitted,



John J. Franco, Jr.
Groce, Locke & Hebdon
2000 Frost Bank Tower
San Antonio, Texas
78205

ATTORNEYS FOR RESPONDENT
JOHN M. PINCKNEY, III

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